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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 631

ALVIN R. CAMPBELL, ARNOLD S. CAMPBELL AND DONALD LESTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district court (R. 75–79, 130–134)[1] are reported at 199 F. Supp. 905 and 206 F. Supp. 213. The opinions of the court of appeals (R. 86–97, 135–141, 148–149) are reported at 296 F. 2d 527 and 303 F. 2d 747. The prior opinion of this Court is reported at 365 U.S. 85.

[1] "R." refers to the record on the present petition. "Orig. R." refers to the record filed with the Court on the earlier petition for certiorari, No. 766, Oct. Term 1959.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1962 (R. 142). A petition for rehearing (R. 143–147) was denied on June 26, 1962 (R. 150). The petition for a writ of certiorari was filed on July 21, 1962, and was granted on December 3, 1962 (371 U.S. 919; R. 151). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an F.B.I. investigator's notes of an interview with a witness and the report based on that interview constituted statements of a witness which were producible under 18 U.S.C. 3500(e).

2. Whether, if the material was not producible under the statute, production was nonetheless required by the due process clause of the Fifth Amendment.

3. Whether, if the *notes* were of a kind which would make them subject to an order of production, the trial court was required either to direct production of the *report* or to strike the witness' testimony because the notes were no longer in existence.

STATUTE INVOLVED

Section 3500 of Title 18 U.S.C. provides in pertinent part:

> *§ 3500. Demands for production of statements and reports of witnesses*
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective

Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * *

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof,

which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

THE ORIGINAL TRIAL AND THE REMAND BY THIS COURT

1. *The original trial.*—Petitioners were convicted of bank robbery in the United States District Court for the District of Massachusetts and were sentenced to imprisonment for twenty-five years.

At the trial, Dominic Staula, who was in the bank to make a deposit at the time of the robbery, was a witness for the government. Staula identified petitioner Lester as the robber who had first pointed a gun at him and ordered him to "get over against the wall." Staula also said that petitioner Arnold Campbell resembled one of the other robbers (Orig. R. 139, 145–146). On cross-examination, Staula testified that he had previously identified Lester (on the day after the robbery) from a picture shown him at a gas station (Orig. R. 168, 181, 183, 190) and had made a positive identification before the grand jury (Orig. R. 178). He could give no description of the third man involved in the robbery (Orig. R. 198).

Also on cross-examination, Staula was asked about an interview with F.B.I. agents. In response to a question as to whether he had signed any statements, he said that "The only thing I signed was a piece of paper saying I was in the bank. I didn't sign anything, I just——" (Orig. R. 180). The pertinent cross-examination regarding the circumstances of the

F.B.I. interview was as follows (Orig. R. 199–200; 365 U.S. at 89, note 2):

> XQ. * * * did they write down what you had to say to them?
>
> The COURT. If you know.
>
> The WITNESS. Yes.
>
> XQ. And did they read it back to you, sir?
>
> A. Yes.
>
> XQ. And did they ask you if that was essentially what you had just related to them?
>
> A. Yes.
>
> XQ. And did you tell them yes?
>
> A. Yes.
>
> * * * * *
>
> The COURT: I will order it produced.

Thereafter, at a bench conference the witness said that he was "pretty sure" it was read back to him, and he stated that he thought he had to sign it, but was not sure. The government said that it had no such statement and that the only document in its possession was an interview report prepared subsequently by F.B.I. agent Toomey which, the government claimed, was a summary of the interview. The government stated it had no notes of the interview. The court requested the report, and the government turned it over without objection. The trial court, over objection, allowed Staula to read the interview report. The court refused to order it produced under 18 U.S.C. 3500, *supra*, pp. 2–3, when the witness stated that he had never seen the report, that it was not a substantially verbatim recital, and that "[t]here are things in there

turned around." 365 U.S. at 97. The court, after examining the report *in camera,* excluded it and sealed it for the record.

2. *The original appeal.*—The court of appeals held that the F.B.I. investigator's summary of an account of the bank robbery by a government witness was not a "statement" under 18 U.S.C. 3500, 269 F. 2d 688, 690. This Court granted certiorari limited to the question "[w]hether production of a statement which was read and signed by a government witness is excused after a complete foundation for it is made under 18 U.S.C. 3500 on the ground that the only document in the possession of the prosecutor is a summary by an F.B.I. Agent and not the statement signed by the witness without any showing as to what became of the original statement." 362 U.S. 909. In its opinion, this Court stated that the trial judge should not have shown the report to the witness in order to determine its admissibility and that the agent should have been called without waiting for the defense to call him. 365 U.S. 85, 96–98. The Court found, however, that it was impossible to resolve the issue whether the trial court had erred in refusing to produce the investigator's summary because the full facts had not been developed at the trial. *Id.* at 88, 98. It held that extrinsic evidence "was required" to answer the following questions (*id.* at 93–94):

> Did Toomey write down what Staula told him at the interview? If so, did Toomey give Staula the paper "to read over, to make sure that it was right," and did Staula sign it?
>
> Was the Interview Report the paper Staula described, or a copy of that paper? * * *

> If the Interview Report was not the original or a copy of the paper Staula described, what became of the paper?
>
> In any event, even if the Interview Report was not the original or a copy of the paper Staula described, had Staula read over and approved the Interview Report? * * * Or was the Interview Report a substantially verbatim recital of an oral statement which the agent had recorded contemporaneously? * * *

This Court stated that the inquiry was to be conducted, not as an adversary proceeding, but as an aid to the judge in discharging his responsibility to enforce 18 U.S.C. 3500. It remanded the cause to the district court to supplement the record by additional findings. 365 U.S. at 99.

THE FIRST HEARING AND APPEAL FOLLOWING THIS COURT'S REMAND

1. *The district court proceedings.*—At the hearing on the remand (before Judge McCarthy), agent John F. Toomey, Jr., who had been with the F.B.I. for eighteen years (R. 1), testified that he had had a single interview with Staula at the Canton police station before noon on July 19, 1957, the day after the bank robbery (R. 2, 18, 30). The interview lasted approximately thirty minutes (R. 11, 27), and only Toomey and Staula were present (R. 2, 27, 30).

Agent Toomey testified that he took notes of what Staula told him on a lined pad, without a carbon (R. 7, 9, 11). Toomey asked several questions and took notes of Staula's replies (R. 7, 28). The agent did not give his notes to Staula to read, sign, or

initial (R. 4, 9, 12, 20, 29–30). He did not read his notes to Staula (R. 4, 20); instead, he orally repeated to Staula his version of Staula's story, refreshing his memory on the basis of the notes (R. 7, 8). Staula told the agent that his (the agent's) account was correct (R. 19).

Toomey testified further that he took "investigative notes" which were complete with respect to the pertinent information (R. 10, 32). Since Toomey does not take shorthand (R. 28), the notes were in longhand and consisted of "key phrases," abbreviations, and one quotation (R. 16, 28, 32). In addition to the one statement in quotation marks, certain words of description, such as "Male, height 5 feet 10," were those of the witness (R. 22). Since the agent did not write down everything Staula told him, some remarks Staula made were not reflected in the notes or the report (R. 5, 15, 29, 31, 36).

The agent dictated the report into a dictaphone, at about nine o'clock in the evening, at his office (R. 8, 25, 30, 40, 44). Staula was not present (R. 7). The agent had talked to another witness that day and had discussed the case with another agent who had interviewed witnesses (R. 6, 9, 10, 13). The report was not a transcript or verbatim copy of the notes (R. 17, 24–26, 33, 39). There was nothing in the notes that was not in the report, but there were some matters in the interview report which were not in the notes (R. 25), such as the name of the teller, the bank, and the town where the robbery occurred (R. 25, 26, 34–35). Before dictating the report, the agent set "the thing up in more or less chronological order" (R. 33).

Then, using the notes to refresh his memory, he paraphrased some of Staula's remarks and put them into proper grammar (R. 33, 40, 46). Agent Toomey identified several phrases in the report (*e.g.*, "a customer at the victim bank") as being his, rather than the witness' words (R. 34). On five or six occasions the report attributed statements to the witness, prefacing them by words such as "Mr. Staula stated * * *"; agent Toomey testified that such statements accurately reflected what Staula had said (R. 24). The report, he testified further, reflected the information in the notes (R. 26–27).

The report was typed by a stenographer in the Boston F.B.I. office and returned to Toomey five or six days later (R. 17, 23). After he had compared the report with his notes to see that the report was accurate, Toomey destroyed his handwritten notes (R. 16–17, 23, 42). This was the general practice of the F.B.I. at that time (R. 23, 42, 60–62).

The trial judge was of the opinion that he could not call Staula as a witness, but he did consider the testimony of Staula given at the original trial (R. 77–78). He found that the original notes, if they had been in existence at the time of the trial, would not have been producible under the statute and that their destruction did not constitute non-compliance within the meaning of 18 U.S.C. 3500(d). He also held that the interview report was not a producible document under Section 3500(e) (R. 78–79).

2. *The opinion of the court of appeals.*—The court of appeals held that a writing based upon an interview,

in order to be producible, must either be specifically approved by the person interviewed or must be substantially verbatim (R. 90). The court said that the test for producibility of unapproved statements—that they be "substantially verbatim" (18 U.S.C. 3500(e)(2))—calls for a "very high degree of exactness" (R. 93). The court, on the basis of the evidence at the hearing before the district court, said that it was clear that what Staula told agent Toomey differed from both the notes and the eventual report (R. 89). Therefore, it ruled that neither the notes nor the report had the requisite exactness to be produced as a "substantially verbatim recital of an oral statement made by [a] witness" which was required to be produced under subsection (e)(2) (R. 96).

The court of appeals held that subsection (e)(1) requires that the action of the witness in adopting or approving the written statement must be "comparable to a signature" and "not merely approval of a general account of which the writing may be representative" (R. 94). The court found that the general oral approval by Staula of what Toomey had recited did not constitute such specific approval. Since, however, it was not clear from the record because of the district judge's erroneous impression that he could not call Staula as a witness, whether Staula had actually signed or approved the notes, the court ordered a further hearing, so that both Staula and Toomey might be examined on the specific question of whether Staula had signed or otherwise adopted or approved the notes (R. 97).

THE SECOND HEARING AND APPEAL FOLLOWING THIS COURT'S REMAND

1. *The district court proceedings.—a.* On November 29, 1961, a second hearing was held before a different district judge (Judge Wyzanski), at which Staula and Toomey testified (R. 100–129).

Staula testified that he had talked with more than one person about the robbery; he did not know whether they were all agents, but did remember an interview at police headquarters on the day after the robbery (R. 101). Defense counsel asked Staula if his trial testimony was still true, and Staula replied that it was (R. 103–104). When defense counsel, reading from Staula's testimony at the original trial, suggested that the agents wrote down what was said, Staula answered (R. 104–105):

> A. Well, they took notes.
>
> Q. Did they write down something while you were talking to them?
>
> A. Well, I really don't know what they were writing down.
>
> Q. The question is whether or not they were writing something.
>
> A. Well, he had a pad in his hand. I don't notice whether he kept writing while I was talking or not.
>
> * * * * *
>
> Q. Well, when you said earlier—"did they write down what you had to say to them"?—and you said "Yes," is that a correct answer?
>
> A. I took it for granted he was writing down what I said.

Staula said that the agent had never given him the pad to read, so that he had no knowledge of what was

written down (R. 108). Thereafter Staula was asked (R. 108):

> Q. So that when you told counsel that he read back what was on the paper, you didn't know what was on the paper at that time, did you?
>
> A. No.

Agent Toomey reaffirmed his former testimony (R. 112–113). In explaining what he did after he had taken the notes, he said that he orally stated the story to Staula "in narrative form," referring to his notes, and that Staula agreed the story was correct (R. 113). To demonstrate to the court what was meant by "narrative form," Toomey, using the interview report, recited parts of the story (R. 113–115). For example, he said (R. 115):

> You stood with your face to the wall for probably ten minutes and then you were told to walk into the vault. You don't recall which one of the men ordered you to go into the vault. And after you got in there you saw these individuals. You didn't see these individuals again. And then somebody closed the door of the vault and said something to the effect that the people in there should not leave for five or ten minutes.[2]

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[2] The interview report for this portion read (365 U.S. at 91, note 3):

"He stated that after he stood with his face to the wall for approximately 10 minutes one of the robbers ordered him and the other people who were standing on either side of him to walk into the vault. He stated that he does not recall which of the robbers issued this order but that he did enter the vault as directed and observed these individuals no further.

"Mr. Staula stated that one of the robbers, closed the door of the vault he issued some order to the effect that the people locked inside should not leave and that they stayed there for 5 or 10 minutes * * *."

The trial court observed that Toomey looked down at the paper before each sentence and Toomey agreed that this was a correct description (R. 115). Toomey stated that his notes covered approximately a page and a half (R. 117). There was only one phrase with quotation marks, and the only other words which were actually those furnished by the witness were his name and address, and the physical description of a robber (R. 118–119). Toomey stated that if another person with the same knowledge of the case had been in the room when Staula spoke, and knew the significance of the notations made by Toomey, he could have dictated substantially the same story (R. 120–122). Toomey confirmed that he had not shown Staula the notes, nor asked him to initial or sign anything (R. 122), and that he had not read his notes back to Staula (R. 123). He did not subsequently transcribe the notes, but used them as a basis for dictating his report (R. 123–124). Toomey testified that his oral summary of Staula's remarks, made in the latter's presence, differed from the notes and also differed from the final interview report (R. 126–127).

b. On December 5, 1961, Judge Wyzanski entered his findings (R. 130–134). He found that Toomey had not read the jottings to Staula, but had adhered to the substance by looking down at the jottings before uttering each sentence, and that Staula had said that the account was true (R. 131–132). He said that Toomey had not asked Staula to sign his approval (R. 132). He further found that

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there was no difference of substance between what Toomey repeated to Staula and what had been jotted on the pad (R. 132). He determined that the disc made by Toomey was a faithful record of Staula's words, some recorded in jottings and and some carried in Toomey's memory (R. 132). The trial judge was of the opinion that Toomey's oral presentation had been adopted by Staula, that the oral presentation was an accurate summary, and that what was dictated into the disc was almost *in ipsissima verba* the narrative as checked with Staula (R. 133). The court concluded that the interview report was therefore producible under both subsections of Section 3500(e) (R. 133–134).

2. *The opinion of the court of appeals.*—On May 22, 1962, the court of appeals rendered a supplemental opinion (R. 135–142). Accepting *arguendo* the district court's findings of fact (R. 139), it concluded that the interview report was not producible.

The court (per Chief Judge Woodbury) reiterated its view that the report was not within subsection (e)(2) both because being in Toomey's words, not Staula's, it was not substantially verbatim, and because it was not contemporaneous (R. 137). The court of appeals also concluded that it was not producible under subsection (e)(1) since it was not a written statement "signed or otherwise adopted or approved" by the witness. Staula, the court observed, had not signed Toomey's notes (R. 139). Toomey had merely recited the "substance" of the notes to

Staula, who had said that Toomey "had the story straight." Toomey, moreover, did not dictate his notes; he first rearranged them in chronological order, and then, relying on the notes and his own memory and using his own language, he formulated his report (R. 138). The court pointed out that slight changes in phraseology can often work vast changes in meaning and that to determine which language in the report was actually approved by Staula would pose a subtle and exceedingly difficult, if not impossible, task (R. 139). The court of appeals answered this Court's inquiries (see *supra*, pp. 6–7) by stating: (1) Toomey did not write down what Staula told him, nor did he give the paper to Staula to read or sign; (2) the interview report was not the paper described by Staula or a copy of it; (3) the paper (the notes) was destroyed in accordance with F.B.I. practice; and (4) Staula did not read over, approve, or see the interview report (R. 140).

Judge Aldrich, concurring, further found that many of the district court's findings on the second hearing, such as the finding that the report was the same as the notes, were not supported by the record (R. 140–141).

On petition for rehearing, the court of appeals held that the issue whether the notes (as distinguished from the report) were producible under 18 U.S.C. 3500(e)(1) was "academic" (R. 148–149). The court reasoned that the statute did not require the F.B.I.

"to take the statements of witnesses" and imposed "no duty, at least in the absence of bad faith, to keep any statements that might have been taken" (R. 148). There was, the court added, "no evidence from which it could possibly be found that Toomey destroyed his notes in bad faith * * *" (R. 148).

SUMMARY OF ARGUMENT

I

During the interview between Staula, the government witness, and the F.B.I. agent, the agent took notes, consisting of abbreviations and key phrases, of Staula's statements. The agent then recited back to Staula the events which Staula had described. Staula agreed with the accuracy of this recital. Nine hours later, the agent made a report on the basis of his notes, his memory, and information from other sources.

A. Under these circumstances, the notes and report were not "statements" of a government witness within the meaning of 18 U.S.C. 3500(e). Therefore, they were not producible under 18 U.S.C. 3500(b) for purposes of impeachment.

1. Subsection (e)(1) of 18 U.S.C. 3500 requires the production of a statement which is signed or otherwise adopted by the witness. This clearly means a written document which the witness has seen and indicated in some way that he has accepted. The document must be fairly attributable to the witness.

It is undisputed that Staula did not see, read, or sign either the notes or the report. His approval of an oral recitation given by the agent was obviously not approval of a written statement. Nor were the

notes read to Staula. Accordingly, his approval of the agent's oral recital could not constitute approval of the notes.

The report made by the agent was even more clearly not adopted by the witness. It was not even in existence when the agent saw Staula and could not possibly have been approved. Even if, as seems extremely doubtful, the report was exactly the same as the agent's oral recital to Staula, subsection (e)(1) does not cover a subsequent written report of an oral account given by an agent to a witness which the witness orally approved.

2. Subsection (e)(2) requires production of a document which (i) is a "stenographic, mechanical, electrical or other recording" of the oral statement of the witness, or a transcription of a recording; (ii) is a "substantially verbatim recital" of the witness' statement; and (iii) has been made "contemporaneously" with the oral statement. The word "recording" refers to an actual record of what the witness has said—not someone's memory of it. Since Congress did not think the word "recording" sufficiently narrow, it required production only of a recording made by an established technique designed to produce the witness' exact words and explicitly required that the statement be substantially verbatim. Congress intended to allow a witness to be impeached only on the basis of his own words, not someone else's.

The notes plainly did not constitute a "recording" and were not "substantially verbatim." They consisted of key phrases and abbreviations, and left out some of Staula's statements entirely. The primary

purpose of the notes was to record briefly information needed for further investigation of an unsolved crime, not to record accurately what the witness had said for purpose of trial.

The agent's report satisfied none of the three requirements of subsection (e)(2). It was obviously neither a recording nor a substantially verbatim recital of Staula's oral account. The agent made no effort to reproduce Staula's oral statement or even the agent's own notes. The information in the notes was combined with other information, was rearranged, and put for the most part in the agent's own words. The report was made nine hours after the interview and was therefore not contemporaneous.

B. The legislative history confirms the conclusion that neither the notes nor the report constitutes a "statement" under the Act. That history shows that Congress deliberately excluded summaries of a witness' oral statements—the very kind of document involved in this case. Throughout the reports and debates there is an emphasis on protecting a witness from being subjected to the harassment of cross-examination based on information not directly attributable to the witness himself. This Court in *Palermo* v. *United States,* 360 U.S. 343, 352–353, specifically held that the legislative history demonstrated that Congress intended in the Act to require the production only of statements in the witness' own words and not summaries.

II

Failure to turn over the notes and report did not result in a conviction without due process of law. The government may be required in certain instances to give information to the defense—for example, if the government knows that a witness has perjured himself. Such a duty exists regardless whether the information is in a report or not; it has therefore nothing to do with Section 3500, and that section is not exclusive in this regard. However, this Court has held that, with regard to the production of statements given by government witnesses for purposes of impeachment, 18 U.S.C. 3500 is exclusive. *Palermo* v. *United States, supra; Rosenberg* v. *United States,* 360 U.S. 367. Therefore, the government is not required to produce any notes or reports not coming within that section.

But even if there may be extreme cases where a report outside Section 3500 must be given to the defense as a matter of due process, this is not such a case. The most arguable example would be if a witness told a story at the trial completely contradictory to that which he had originally told the government. The report here, however, was not inconsistent with Staula's testimony and the difference in nuances was not necessarily attributable to Staula. This was precisely the type of report that Congress declared should not be used for impeachment, and no facts are shown which would justify production outside the scope of the congressional mandate.

III

Even if the notes had been producible, their good-faith destruction, in accordance with normal practice, did not require either striking the witness' testimony or production of the report.

1. Subsection (d) of 18 U.S.C. 3500 plainly does not require striking a witness' testimony when the notes of his interview have been destroyed in ordinary course. Section 3500 first refers to any statement in the possession of the government; it then provides for striking a witness' testimony when the government "elects" not to produce. Thus, it plainly applies only when the government has the document, unless it has been shown that the government has destroyed it for improper motives. Subsequent to the remand in this case, this Court in *Killian* v. *United States*, 368 U.S. 231, ruled that a good-faith destruction of temporary notes did not require a new trial.

2. Nor would good-faith destruction of the notes entitle petitioners to the report as secondary evidence. To allow production of the report as secondary evidence of the notes would defeat the Congress' clear purpose in Section 3500 to make producible only statements which are clearly attributable to the witness. Good-faith destruction cannot create a producible statement out of one which does not qualify under the statute.

ARGUMENT

INTRODUCTION

The hearings on the remand of this case have made clear that the issue which this case was originally thought to present—the effect of the destruction of a statement read and signed by a witness—is not in the case at all. There is no dispute about the fact that Staula neither read nor signed anything. He neither saw nor read the notes; he did not see or read the agent's subsequent report of the interview. What happened is that the agent, in interviewing Staula, took notes summarizing those items that he deemed to be significant. On the basis of this summary, the agent orally stated his version of Staula's account—which Staula affirmed to be correct. Thereafter the agent, using his notes and other information as a basis, dictated an interview report which embodied the features of the interview he deemed significant. Having completed his report, he destroyed his notes.

The questions which this case now presents are, therefore, whether the notes or the interview report, even though not read or signed by the witness, were producible statements under 18 U.S.C. 3500, and whether, even if they did not qualify under the statute, they should nevertheless have been produced. It is the government's position that neither the notes nor the report qualify as producible state-

ments under the statute and that there were no other circumstances which would require their production. If, contrary to our contentions, the notes were properly producible, the issue remains whether the destruction, in accordance with usual practice, required the district court either to order production of the report or to strike Staula's testimony.

I

THE NOTES AND REPORT OF THE AGENT WERE NOT PRODUCIBLE UNDER 18 U.S.C. 3500(e)

A. THE CONDITIONS STATED IN THE STATUTE WERE NOT SATISFIED

Section 3500(b) of Title 18 U.S.C. provides that the government is required to produce certain statements made by government witnesses to government agents for the purpose of enabling the defense to seek to impeach those witnesses. Subsection (e) defines the two types of statements which are producible: "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." Neither the notes nor the report qualify under either definition.

1. *Neither the notes nor the report was "signed or otherwise adopted or approved" by the witness within the meaning of subsection (e)(1)*

A writing need not be produced under subsection (e)(1) unless it is a "written statement" made by the witness and "signed or otherwise adopted or approved by him." The obvious intent is that the witness should have seen the document and manifested, either by his signature or by some other method, his acceptance of the document as his own statement. A witness cannot (except for the type of statement defined in subsection (e)(2)) be impeached by a document which he has not adopted as his own. He can, of course, be impeached by other means—by cross-examination or contradictory testimony, or by proof of lack of credibility—but if the impeachment is to be on the basis of a document, the document must, under the statute, be fairly attributable to the witness.

In this case it is undisputed that Staula did not see, read, or sign the notes (R. 108; Pet. Br. 21, note 9). Staula did say that the agent's oral account of the events that Staula had described was an accurate account of what had occurred (R. 131). We doubt whether Staula's acknowledgment of the accuracy of Toomey's recital is fairly to be taken as an adoption or approval of the agent's statement as his own, but the point is immaterial because the agent's oral

account obviously was not the "written statement" that the statute requires.

Nor can it be said that the notes were read to Staula and that he then "adopted or approved" the notes. The testimony is clear that the agent did not read the notes (R. 4, 20, 123); he recounted to Staula a narrative of the events Staula had described, basing the narrative on his notes (R. 7, 8, 113). But the notes were not in narrative form. They were jottings which the agent used to refresh his memory in constructing the narrative (R. 118–119). As every lawyer is aware, no two statements or arguments based upon the same notes will be exactly alike. At the hearing, the agent demonstrated from the report in front of him how the notes were used. He stated that Staula said that "somebody closed the door of the vault and said something to the effect that the people in there should not leave for five or ten minutes" (R. 115). The report recounts that Staula said that the robber who closed the door told them not to leave and that they stayed there for five or ten minutes until the door was opened. See 365 U.S. at 91, note 3. This is a good example of why a witness should not be impeached on the basis of a document which is not, in a very real sense, his own and which he has not specifically adopted. A skillful cross-examiner could make much of the difference, quite unfairly to Staula who had not chosen the words. Judge Wyzanski also found that the agent changed the sequence. These are highly

significant variations. As this Court said in *Jencks* v. *United States*, 353 U.S. 657, 667:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes * * * [of] a contrast in emphasis upon the same facts, even a different order of treatment * * *.

See also *Clancy* v. *United States*, 365 U.S. 312, 316.

Properly understood, Judge Wyzanski's findings do not establish that Staula adopted the notes. True, toward the conclusion of his opinion, he said (R. 134):

> I am persuaded that Toomey, by glancing down at the jottings and other indications, did in fact "read [those] words to him" and was not "elaborating it [the text] in recounting back to the witness."

But other portions of the opinion make it plain that Judge Wyzanski did not mean literally that the agent read the notes verbatim, but that his oral restatement of the substance of Staula's account of the robbery as derivgd from the notes was enough to satisfy the standards laid down by the court of appeals. Earlier the judge found that "Toomey did not purport to read the jottings on the pad in just the order they appeared, nor with the scrupulous care that one stenographer would read back to another" (R. 131). The notes were "re-arranged for order" and there were other differences in form between what the agent said to Staula and what he had jotted on the pad (R. 132). Indeed, if the concluding portion of Judge

Wyzanski's opinion is to be taken as a finding that the agent read his notes to Staula verbatim so that Staula's approval was an approval of the notes, the finding is utterly without support in the evidence (see R. 4, 20, 123, 141).

The agent's report even more clearly fails to satisfy the requirement of a written statement "signed or otherwise adopted or approved" by the witness. The report was made on the basis of the agent's brief notes, memory, and apparently other information nine hours after the interview had been completed. The alleged "written statement," therefore, was not even in existence for the witness to adopt or approve at the time of the interview, and he never saw it after it was prepared. Normal human experience casts the gravest doubt upon Judge Wyzanski's conclusion that the written report was "almost *in ipsissima verba* the narrative" which the agent orally stated to Staula (R. 133), but even if one accepts that finding, Subsection (e)(1) does not cover a subsequent written report, however accurate, of an oral account given by an agent to a witness which the witness had heard and orally approved. Subsection (e)(1) requires not an oral but a written statement, and the writing must be adopted or approved. Since the witness approved no writing, the agent's report, to qualify as a statement, must satisfy subsection (e)(2), which alone deals with reproductions of oral statements.

Accordingly, we turn to the analysis of that subdivision.

2. Neither the notes nor the report was a producible statement under subsection (e)(2) because neither constituted a substantially verbatim recording, or transcription of a recording, of the witness' oral statement, and the report was not made "contemporaneously" with the oral statement

To be a statement under subsection (e)(2) a document must meet three requirements: (i) it must be a "stenographic, mechanical, electrical, or other recording" of the oral statement, or a transcription of the recording; (ii) it must be a "substantially verbatim recital"; and (iii) the recording must have been made "contemporaneously" with the oral statement.

The notes fail to satisfy either of the first two requirements. Where a witness actually subscribes to the accuracy of a written document or otherwise adopts it as his own, it is fair that he be required to explain any inconsistencies, however small, between his testimony and his written statement, but it is unfair to the witness and disruptive of the search for truth to permit him to be challenged, not with his own words, but with the words of someone else who will inevitably have read into the language his own sense of meaning, emphasis, and coloration. No record of an oral statement which depends upon a human agent is absolutely perfect, but the statutory language shows that nothing less than a recording of assured accuracy was considered acceptable for the purpose at hand. Congress strictly limited the use of reports, concerning a witness' oral statements to a "stenographic, mechanical, electrical, or other recording." The word "recording" indicates

that there must be an actual record of what the witness said—not someone's summary—and since Congress did not think the word "recording" sufficiently narrow, it required the recording to be made by one of the established techniques calculated to reproduce the witness' exact words. Furthermore, to eliminate any possibility of misunderstanding, Congress went on to provide that the recording must be "a substantially verbatim recital of an oral statement."

By no stretch of the imagination can Toomey's investigative notes be regarded as a "recording" constituting a "substantially verbatim recital" of what Staula said. The handwritten notes made by the agent as one of the bases of a more formal report for his colleagues, superiors, and files are subject to all the variations attendant upon individual methods of taking personal notes for the sole purpose of refreshing one's own recollection. The testimony shows that the notes consisted of key phrases and abbreviations; only in a few instances did they correspond to the witness' words (R. 22–26). Some of Staula's statements were not reflected in the notes at all (R. 31, 36).

The agent's testimony concerning the character of his notes is entirely plausible. At the time Staula was interviewed he had not identified petitioner Lester and the report indicates that Staula, who was obviously not very articulate, could not give a very full oral description. Staula identified Lester later when he saw a photograph. Thus, at the time the notes were made the agent must have been primarily concerned with solving the crime rather than with taking an

exact statement from the witness in preparation for a possible prosecution. He would naturally have concentrated on the information which seemed most likely to produce further clues, *i.e.* the description of the man in the blue suit whom Staula, at the trial, could identify only as resembling Arnold Campbell. Similarly, one can feel sure that Toomey was concentrating upon obtaining as much immediately useful information as possible, with substantial accuracy for his purposes, rather than with setting forth verbatim the statement of the witness. We agree, of course, that when the government is preparing for trial it is concerned with obtaining a verbatim statement which may be valuable not only for impeachment but in preparing for trial and for refreshing the witness' recollection. When Staula was interviewed, on the day after the robbery, this was not a primary consideration as shown by the very fact that the agent did not make a recording or even ask Staula to sign or otherwise adopt a written statement.

Toomey's report satisfies none of the three requirements of subsection (e)(2). First, it is not a "stenographic, mechanical, electrical, or other recording" of anything Staula said. If Congress had been satisfied with reports written up by a listener with all the fallibility of human recollection, it would not have confined the definition to recordings made by stenographic, mechanical, electrical, or similar means.

Second, the record in this case shows that the agent's report did not even attempt to reproduce "substantially verbatim" either Staula's statements or Toomey's own notes. The report included informa-

tion concerning the crime which was not in the original notes and which apparently came from other persons to whom the agent had talked during the investigation (R. 25–26, 34–38). This information was mixed indiscriminately with the information obtained from Staula. The agent rearranged his notes before he dictated the report (R. 33, 40). The report did not purport to contain everything that Staula had said, nor did it purport to use Staula's words rather than the agent's (R. 31–36). The chronology, grammar, and structure were all largely attributable to the agent. It is certain that the agent's report did not precisely correspond to the earlier oral summary of the notes and that the extent of the differences can never be reconstructed. Cf. *United States* v. *McKeever*, 271 F. 2d 669, 674–675 (C.A. 2).

Third, the report fails to satisfy subsection (e)(2) because even if it was a recording, it was not "recorded *contemporaneously* with the making of such oral statement" (emphasis added). Obviously, Congress was unwilling, in this instance, to trust human memory for even a few hours as a method of preserving a witness' words.

Judge Wyzanski's reasoning is wholly inconsistent with the thrust of subsection (e). He held, in effect, that the statute was applicable because the agent restated from his notes with substantial accuracy an account of the events that Staula orally approved and subsequently the agent wrote up a report which restated the account, again with substantial accuracy; and this the judge considered near enough to the requirements of the statute. For many purposes the

report might be a reliable guide to the events and even to Staula's recollection as he gave it to Toomey, but it falls short of the kind of statement that Congress was willing to have used for purposes of impeachment. No doubt Congress was as aware as this Court that (*Jencks* v. *United States*, 353 U.S. 657, 667):

> The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

And Congress apparently concluded that witnesses should not be taxed with the omission of facts, or a contrast in emphasis, or a different order of treatment, not part of the witness' own statement but resulting from another person's judgment concerning the relevance of the facts, the desirable emphasis, and the logical order of relation. The words of the statute strictly confine the duty to produce to written statements signed or adopted by the witness and contemporaneous verbatim recordings, made by reliable methods, of what the witness himself said. The legislative history, to which we now turn, shows that these strict requirements were written into the statute by deliberate choice.

B. THE LEGISLATIVE HISTORY CONFIRMS THE CONCLUSION THAT NEITHER THE NOTES NOR THE REPORT CONSTITUTE A "STATEMENT" UNDER THE ACT

The legislative history shows that Congress, in defining the documents which were to be producible

under the Act, proposed to exclude the kind of document involved in this case.[3] Throughout the reports and debates on the proposed bills the emphasis was on protecting a witness from being subjected to the harassment of cross-examination based upon statements which may not be fairly attributable to the witness himself.

In the Senate hearings on the Act, the Attorney General made a statement which was adopted by the committee in reporting a bill requiring only the production of statements signed or approved by the witness. S. Rept. No. 569, 85th Cong., 1st Sess., pp. 3–4. His statement stressed the problems which would arise if the government could be ordered to produce reports orally made by a witness (S. Rept. No. 569, 85th Cong., 1st Sess., p. 7):

> The Department takes the position that unless the witness has been in some way informed of the statements attributed to him, and has indicated his approval of their accuracy, that such reports should not be turned over to the defense. Such reports are mere hearsay as far as the witness is concerned and cannot and should not be used to attack the credibility of a witness. Obviously the credibility of a witness cannot be impeached by using a statement that the witness has never seen and never approved and which was prepared by someone else.

There is no question about the type of case the Attorney General had in mind. He illustrated his point

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[3] The general legislative history is outlined in *Palermo* v. *United States*, 360 U.S. 343, 345–348, 356–360. The Court's conclusions concerning this history are quoted *infra*, pp. 39–40.

by telling the committee of a narcotics case in Georgia where the government was ordered to produce oral statements which had been "paraphrased and summarized" in the agent's report. "The agent had dictated his report after his interviews and, at best, his report was a summary of the interview—obviously hearsay evidence." *Id.* at 6. In later reporting a bill allowing the production of "any transcriptions or recordings of oral statements made by the witness to a Federal law officer * * *," the Senate Committee again relied heavily on the Attorney General's statement. S. Rept. No. 981, 85th Cong., 1st Sess. It also noted with approval a ruling by Judge Moore in *United States* v. *Anderson,* 154 F. Supp. 374 (E.D. Mo.). Judge Moore had held that the government was required to produce "only continuous, narrative statements made by the witness recorded verbatim, or nearly so," and not "notes made during the course of an investigation (or reports compiled therefrom) which contain the subjective impressions, opinions, or conclusions of the person or persons making such notes." S. Rept. No. 981, *supra,* p. 8.

The House Report—which related to a bill allowing the production only of written statements signed by the witness or otherwise adopted or approved—likewise evidenced concern that the witness not be subjected to unfair harassment. The report stated (H. Rept. No. 700, 85th Cong., 1st Sess., pp. 5–6):

> Unless a witness has adopted or otherwise approved reports made to the Government, it is not to be turned over to the defense * * *. Such material, insofar as the witness is con-

> cerned, is hearsay evidence and should not be used to attack his credibility when he is being cross-examined * * *.
>
> * * * * *
>
> [The bill] provides that after a Government witness has completed his direct examination, the court shall on motion of the defendant order the United States to produce for the inspection * * * such reports or statements of the witness in the possession of the United States *as are signed by the witness, or otherwise adopted or approved by him as correct,* relating to the subject matter as to which he has testified.
>
> The italicized language is a vital part of the bill. Without this provision the general language of the Jencks case could be interpreted as requiring the production of summaries of oral statements made by witnesses to a law-enforcement agent which the witness had never seen or in any way approved. Unless the witness has been in some way informed of the statements attributed to him and has indicated his approval of their accuracy, the summaries should not be turned over to the defense. Such reports are mere hearsay as far as the witness is concerned and cannot and should not be used to attack the credibility of the witness. Obviously the credibility of a witness cannot be impeached by using a statement that the witness has never seen and never approved and which was prepared by someone else. [Emphasis in original.]

The House committee noted the practice of federal agencies in taking written statements from important witnesses (*id.* at 6):

> This is vital not only to insure the accuracy of the statement at the time it is made but to

tie the witness down so that he will stand by the statement which he has read and signed.

Where it is impossible to obtain the signature of the witness to his statement, or where because the matter is relatively unimportant a signed statement was not originally requested, it is the practice in many cases to obtain the approval or adoption by the witness of the summary which has been made of his interview. Whenever this is done, the fact of such approval or adoption is made a matter of record and it is the type of statement, in addition to signed statements, which would be subject to production under the bill.

Where, however, it has been impossible to obtain any verification from the witness that a summary of an interview is correct, it is quite clear that such an unverified and unauthenticated summary could not be used legitimately for impeachment purposes.

On July 3, 1957, Senator Morse offered an amendment in the Senate which would have covered the type of interview report involved in this case. The amendment would have required the production of (103 Cong. Rec. 10878):

> Any record in the possession of the United States which contains a recitation or the substance of any oral or written statement previously made by a witness touching upon the substance of the testimony of that witness.

Senator Morse argued that, since very few F.B.I. summaries are seen by witnesses, the bill, unless so amended, would not cover the vast majority of situations. 103 Cong. Rec. 10877–10878. The amendment

was never voted upon and was abandoned. See *id.* at 10984, 15129, 15805–15813, 15799.

The version of the bill before the Senate on August 23, 1957, provided for production of signed or otherwise approved statements, "and any transcriptions or records of oral statements made by the witness to an agent of the Government * * *." 103 Cong. Rec. 15787. During the debate, Senator Morse explained that the original draft had provided that "recordings of oral statements" be "verbatim." He said that "verbatim" was dropped because that was an impossible standard since electrical recordings could be changed, "[i]f transcribed by a secretary, they are subject to error," and even expert official reporters make mistakes. 103 Cong. Rec. 15812. However, Senator Morse said, the Acting Attorney General agreed to eliminate "verbatim" only if the legislative history made clear (*ibid.*):

> that the statements be as close to verbatim as possible—in other words, as close to a word-by-word reproduction as possible.

Although Senator Morse thought this was too limited, his views did not ultimately prevail. The phrase "substantially verbatim" was inserted in the statute as it was passed.

The Department of Justice expressed concern that the word "records" would include memoranda and notes. *Id.* at 15791.[4] An amendment was thereafter offered to change "records" to "recordings." *Id.* at 15930. Senator Dirksen explained that this amendment would require production only of "the actual

[4] Senator O'Mahoney, the manager of the bill in the Senate, characterized this concern as "mere speculation." 103 Cong. Rec. 15791.

recordings"; otherwise, using the word "records," "The sky may be the limit." *Id.* at 15931. Senator Hruska said that "records" was too broad as that would reach summary reports "which represent not the words of a witness whom it is sought to impeach, but instead, the words of some third person's understanding of what the witness said. * * * It would seem to me not to be in keeping with the purpose of the proposed legislation to have a witness impeached by material for which he himself was not responsible." *Ibid.* Senator Kuchel stated that "the ends of justice require the Congress, in determining the procedures in such a case, to clothe the witness, as against the defendant, with some protection, so that the witness will not have thrown at him records which are not agreed to be the witness' statements." *Id.* at 15932. Senator Hickenlooper, in describing what was a "record" rather than a "recording," suggested that, if a witness telephoned an agent, and later the agent wrote down from memory his interpretation of what he understood the witness to say, such notation which the witness had never seen or approved, nor had said was correct, would be a "record." Senator O'Mahoney, the manager of the bill, replied it would be inadmissible and hearsay. *Ibid.*

The amendment to change "records" to "recordings" did not pass, 103 Cong. Rec. 15935. However, the bill as it emerged from Conference (H. Rept. No. 1271, 85th Cong., 1st Sess., p. 2) and, as it was finally enacted, used the word "recording" rather than "records." The conference report of the Managers in the House indicates that subsection (e) was inserted to limit the types of statements producible by the

Act. H. Rept. No. 1271, *supra*, p. 3. The report specifically stated that the final bill was in line with the standards laid down by Judge Moore in the *Anderson* case (see *supra*, p. 33). H. Rept. No. 1271, *supra*, p. 3. In the debate on the conference report, Senator Javits asked (103 Cong. Rec. 16488):

> [W]hat has been done with the so-called records provision [subsection (e)(2)] is to tie it down to those cases in which the agent actually purports to make a substantially verbatim recital of an oral statement that the witness has made to him—not the agent's own comments or a recording of his own ideas, but a substantially verbatim recital of an oral statement which the witness has made to him, and as transcribed by him; is that correct?

Senator O'Mahoney replied, "Precisely." 103 Cong. Rec. 16488.

The legislative history precludes the loose interpretation of the term "substantially verbatim" suggested by petitioners. The Congressional intent is clear that a witness may be impeached by documents only if they were truly attributable to the witness—that is, signed or approved by him, or recorded with a high degree of accuracy. Congress approved, in passing the bill, Judge Moore's opinion in *United States* v. *Anderson*, which described the type of document which should be produced as "recorded verbatim, or nearly so." Congress specifically refused to require production of summaries of oral statements made by government witnesses.

In *Palermo* v. *United States*, 360 U.S. 343, 350, 352–353, this Court confirmed this view of the Congressional intent, stating:

[S]ome things too clearly evince a legislative enactment to call for a redundancy of utterance. One of the most important motive forces behind the enactment of this legislation was the fear that an expansive reading of *Jencks* would compel the undiscriminating production of agent's summaries of interviews regardless of their character or completeness. Not only was it strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest, but it was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations.

* * * * *

It is clear that Congress was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment. It was important that the statement could fairly be deemed to reflect fully and without distortion what had been said to the government agent. Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions. It is clear from the continuous congressional emphasis on "substantially verbatim recital," and "continuous, narrative statements made by the witness recorded verbatim, or nearly so . . .," * * * that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a re-

> port which merely selects portions, albeit accurately, from a lengthy oral recital. Quoting out of context is one of the most frequent and powerful modes of misquotation. We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced.

The notes and report in this case do not meet the standards for production which the legislative history of the Act and the *Palermo* case establish. The notes were plainly summaries consisting merely of jottings and abbreviations. The notes generally did not incorporate the words of the witness, and some of the witness' remarks were not included in the notes at all.

The report is even more clearly a summary—being approximately 500 words, although the interview lasted for a half hour. The report was purposely selective, containing material not provided by Staula, and omitting material which Staula gave. It is, for the greater part, in the words of the agent, and is based on his memory, the abbreviated investigative notes, and other information.

At the time the report was dictated, the agent did not have any reason to consider his report as a document which would have any bearing on the testimony of a witness. The agent had not obtained from this rather inarticulate witness any verbal de-

scription that was detailed enough to indicate that the witness was important. The agent had no way of knowing that the witness could identify visually what he could not describe orally. The report shows on its face that its primary purpose was to record the clues that might be useful in the investigation of the robbery, rather than to pin down the story of the witness. Under the circumstances, it would be manifestly unfair to the witness to allow him to be impeached upon the basis of a report which so largely reflected the agent's judgment of what was significant and the agent's selection of words, chronology, and detail.

II

FAILURE TO TURN OVER THE NOTES AND REPORT DID NOT RESULT IN A CONVICTION WITHOUT DUE PROCESS OF LAW

In *Palermo* v. *United States*, 360 U.S. 343, 349–351, and *Rosenberg* v. *United States*, 360 U.S. 367, 369, this Court held that 18 U.S.C. 3500, rather than any prior decisional law, controls the production of statements given by government witnesses for purposes of impeachment. The only question remaining, therefore, is whether, even if the notes and report fall outside the statutory definition of a producible statement, the information which they contained was of such significance to the defense that, as a matter of due process, the material, or at least the information contained in it, should have been conveyed to the defendants in the interests of justice. The existence of possible constitutional questions in this area is sug-

gested in the concurring opinion in *Palermo* v. *United States*, 360 U.S. 343, 362–363. But see *id.* at 353–354, note 11 (majority opinion).[5]

It is important to distinguish two separate situations. First, the government may be compelled, either as a matter of due process or of the supervisory power of the courts to ensure the fair administration of criminal justice, to furnish the defense certain *information*. For example, if this government has positive information that false testimony is being given, it would have the duty to come forward itself to offer this information. See *Napue* v. *Illinois*, 360 U.S. 264. This duty exists irrespective of whether the information is contained in notes, a report, or merely in the knowledge of government officials; it has nothing whatsoever to do with the responsibility imposed by 18 U.S.C. 3500 to produce particular documents for purpose of impeachment and therefore that section does not forbid disclosure of this information.

The second situation is when summaries or other documents reflecting statements made by government witnesses are sought by the defense for purpose of impeachment. This is the subject covered by 18 U.S.C. 3500. Congress has decided that a sum-

[5] The majority stated: "The statute as interpreted does not reach any constitutional barrier. Congress has the power to prescribe rules of procedure for the federal courts, and has from the earliest days exercised that power. * * * It is obviously a reasonable exercise of power over the rules of procedure and evidence for Congress to determine that only statements of the sort described in (e) are sufficiently reliable or important for purposes of impeachment to justify a requirement that the Government turn them over to the defense."

mary of a witness' statement, which has neither been approved by the witness nor is a substantially verbatim recital of this statement, may not be used to impeach his testimony. This judgment was based on Congress' view that such inexact summaries are not sufficiently reliable (see *supra*, pp. 31–38). We submit that this judgment was a reasonable one—that, therefore, limiting the production of statements to those within the terms of 18 U.S.C. 3500 is fully consistent with due process. We believe, as this Court explicitly held in *Palermo* and *Rosenberg*, that 18 U.S.C. 3500 is exclusive as to the production of statements made by witnesses for the purpose of impeachment.

Assuming *arguendo*, however, that there may be some highly unusual cases where basic fairness requires production of a report for purpose of impeachment even though the report does not come within 18 U.S.C. 3500, this is not such a case. Probably the most arguable example is a witness who originally told the government an elaborate story and then at trial told a diametrically opposed story. But even assuming that due process would require production of a summary of the witness' first statement to the government, there is nothing in this case to bring it within any such exceptional category.

The notes are of course not in existence, so it is impossible to state with precision the information they contained. However, agent Toomey testified that all of the information in the notes was substantially included in the report. Consequently, if the information in the report is not of a kind requiring

production of the report as a matter of due process, the same is likewise true of the notes.

There are no inconsistencies between the report and Staula's trial testimony which could possibly require production as a matter of due process. Staula did not, as petitioners state (Pet. Br. 15), identify the three petitioners at the trial. He identified Lester as the man who held a gun and told him to get up against the wall; he said that Arnold Campbell looked like the man in the blue suit whom he glimpsed through the corner of his eye; and he testified that he knew that there was a third man because he could see that one man was talking to another fellow behind the cages who was not the one standing behind him (Orig. R. 140, 143–147). He was specifically asked whether he could describe the third man in any way and his answer was "No" (Orig. R. 198).

The report is completely consistent with Staula's testimony. As to the third man, the report reads: "Mr. Staula stated that he did not observe a third man in the bank." 365 U.S. at 91, note 3. Staula never claimed at the trial that he actually "observed" the third man or could describe him. Since, at the time Toomey interviewed Staula, identification of the robber was the agent's primary objective, lack of observation would obviously be the most pertinent factor to Toomey.

Nor is the report inconsistent with Staula's testimony as to Arnold Campbell. It is obvious from the report that the agent thought that Campbell would be the robber whom Staula would be most likely to identify. At the trial Staula, far from overstating

his recollection of the robbers, merely said that Arnold Campbell looked like the man in the blue suit.

As to Lester (whom Staula identified at the trial), the interview report states merely that Staula, after he was ordered against the wall, "observed a man whom he described as being a negro, wearing gray chino pants, standing in the center of the lobby and holding a gun." 365 U.S. at 90, note 3. At the trial, Staula testified that, at the time of the robbery, he noticed the man's shirt, a white one with short sleeves (Orig. R. 138–141).

The significant pre-trial event, from Lester's standpoint, is that Staula picked out his photograph and identified him as one of the robbers. This took place on the same day as the Toomey interview, *i.e.*, the day after the robbery. But the interview by Toomey had no relationship to this event. Staula had not seen the photograph at the time of the F.B.I. interview and no F.B.I. agent was present when the photographs were subsequently shown to him (Orig. R. 168–171, 179–180, 193). As to this critical event—the identification of Lester's photograph—defense counsel had opportunity to cross-examine and exercised it to the full (Orig. R. 168–172; 181–184, 187, 190, 192).

There was thus no exceptional reason why the report or the information contained in it should have been turned over to the defense. The report, as such, was not fairly attributable to the witness. The information it contained was not in conflict with his testimony. At most the report might have revealed differences in nuances and details—differences which could not necessarily be attributed to the witness.

There are no circumstances, we submit, which could conceivably justify a holding that constitutional necessity requires the rejection of the rule promulgated by Congress in 18 U.S.C. 3500.

III

EVEN IF THE NOTES WERE PROPERLY PRODUCIBLE, THEIR DESTRUCTION, IN ACCORDANCE WITH USUAL PRACTICE, DID NOT REQUIRE EITHER STRIKING THE WITNESS' TESTIMONY OR PRODUCTION OF THE REPORT

We have argued above that the notes (as well as the report) were not properly producible either under 18 U.S.C. 3500 or as a matter of due process. Here, we assume, *arguendo,* that the notes—which were somewhat more directly based on the witness' statements at the interview than the report and were set down contemporaneously with the statements—were producible as a matter of law. Since they were destroyed by the agent, in accordance with usual practice, immediately after he had read the report, they could not have been produced in fact. The question therefore remains whether, if the notes were producible, the inability of the government to produce them required either striking witness Staula's testimony or production of the report, even though it would not otherwise be producible.

1. *Striking Staula's Testimony.*—As the court of appeals found (R. 148), it is clear that the notes were destroyed by the F.B.I. in good faith. It is the report, rather than the agent's own notes, which is customarily passed on to others. For this reason, although such notes are sometimes kept by the agent,

they are more often destroyed after his investigative report has been prepared. It would be most difficult, if not physically impossible, for the government to keep for years all the personal notes of its various agents, as well as all reports.

In particular, there was no reason why the F.B.I. agent should have deemed his own notes worthy of being kept for subsequent trial purposes. The interview with Staula was intended to obtain information useful to continue the investigation, not to record evidence for a trial. Staula's interview with the F.B.I. was at noon, and therefore before Staula identified petitioner Lester's picture to the police (not the F.B.I.) in the afternoon. From the F.B.I. interview, before the pictures were shown to Staula, the information gathered which could prove useful for future investigation was simply Staula's description of the man in the blue suit (the man whom Staula at the trial could identify only to the extent of saying that Arnold Campbell resembled him). This is reflected in the space devoted to this description in the formal report subsequently made by the F.B.I. agent. Staula's role as a potential witness became truly significant and assumed importance only when he identified Lester, an event which occurred after the F.B.I. interview and was made to persons other than the F.B.I.

If a party wilfully destroys evidence relating to a contested issue, he may be subject to a presumption that the evidence would have been unfavorable to his cause. Applying analagous reasoning, if a court found that a producible statement of a witness had

been destroyed for improper motives, it conceivably could regard destruction as the equivalent of non-compliance with an order to produce under 18 U.S.C. 3500(d). It might therefore preclude the government from using the testimony of the witness whose statement had been so destroyed.

However, subsection (d) plainly does not require striking the testimony of a witness when the record of his statements has been destroyed in ordinary course. The statute refers to any statement of the witness in the possession of the United States. 18 U.S.C. 3500(b). This necessarily means in the possession of the United States at the time production is requested. A party cannot be called upon to produce that which he does not have. Similarly, subsection (d) provides for striking a witness' testimony: "If the United States *elects* not to comply with an order of the court under paragraph (b) * * *" (emphasis added). If the government does not have a document, there can be no election to refuse its production.

If, for example, a statement clearly producible under 18 U.S.C. 3500 was accidentally destroyed by fire, that would be no reason for excluding the live testimony of the witness. Our system of trial rests on the assumption that such testimony given under oath and subject to cross-examination, is superior to an unsworn *ex parte* statement. The *ex parte* statement may or may not be useful in cross-examination of the witness for impeachment purposes, but the mere fact that it is not in existence does not mean

that the testimony of the witness should not be received.

Subsequent to the remand in this case, this Court in *Killian* v. *United States*, 368 U.S. 231, considered the contention that destruction of notes required a new trial. This Court noted "that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed." *Id.* at 242. The Court then held that if the only purpose of the notes was to transfer the information onto signed receipts and if they were then "destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right. * * * It is entirely clear that petitioner would not be entitled to a new trial because of the nonproduction of the agents' notes if those notes were so destroyed and not in existence at the time of trial." *Id.* at 242. There was no dissent on this issue.

2. *Producing the Report.*—Nor would the good-faith destruction of the notes entitle petitioners to a copy of the report as secondary evidence of the notes. This would defeat the intent of Congress that the only statements which must be produced are those which are clearly attributable to the witness. Petitioners are incorrect in assuming that 18 U.S.C. 3500 creates a right of discovery. That statute defines statements which are producible for impeachment purposes and the procedures for producing them. Good-faith destruction cannot make a producible statement out of

one which does not qualify under the statutory definition.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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